Supreme Court, U.S.
FILED

(2)

NO. 931630 MAR 28 1994

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM 1993

ANDREW V. RESTIVO, II,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

Robert Glass
Counsel of Record
John Wilson Reed
Lane R. Trippe
GLASS & REED
338 Lafayette Street
New Orleans, LA 70130
Tel.: 504/581-9065

Attorneys for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

51 pp

TABLE OF CONTENTS

		Page
APPENDIX A:	*United States v. Andrew V. Restivo, II,* 8 F.3d 274 (5th Cir. 1993).	1
APPENDIX B:	*United States v. Andrew V. Restivo, II,* 8 F.3d 274 (5th Cir. 1993)(petion for re-hearing and suggestion for rehearing en banc)	23
APPENDIX C:	Direct Examination by the Government of Jerry Delchamps as it Pertained to his Plea Bargain.	25
APPENDIX D:	Cross-examination of Jerry Delchamps as it Pertained to his Plea Bargain.	30
APPENDIX E:	Jerry Delchamps' Plea Bargain Letter	42

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

NO. 92-9585

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

ANDREW V. RESTIVO, II,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

(November 22, 1993)

Before POLITZ, Chief Judge, REAVLEY, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Andrew Restivo appeals his convictions on eleven counts of a twelve count indictment charging him with the following offenses: conspiracy to misapply bank funds and to make false entries in bank documents; executing a scheme to defraud a bank; will-

ful misapplication of bank funds; money laundering; knowingly causing to be made false entries in bank documents; and perjury before a grand jury. Finding no reversible error, we affirm.

I

During his tenure as president of Schwegmann Bank (the "Bank"), Restivo developed an insurance premium finance ("IPF") department which provided consumer financing for automobile insurance premiums. Lloyd Hoffman, a vice-president and loan officer at the Bank, brought in Jerry Delchamps as a new Bank customer. Delchamps was president of Dixie Lloyds Insurance Company ("Dixie Lloyds"), an automobile liability insurer. To conduct the financial transactions of Dixie Lloyds's, Delchamps opened and maintained checking accounts at the Bank.

In September 1989, Delchamps approached *Restivo and Hoffman for a $1.6 million* loan.[1] Restivo and Hoffman presented on Dixie Lloyds's behalf two loans packages to the Bank's Board of Directors. The Bank eventually approved a loan to Dixie Lloyds in the amount of $500,000.00.

The September loan did not solve Dixie Lloyds's problems. By February 1990, Delchamps's accounts with the Bank were overdrawn in the amount of $345,000.00. With Restivo's alleged approval, Delchamps executed a promissory note to the Bank in the amount of $500,000.00. The Bank's Board of Directors had no knowledge of this loan.[2]

---

[1]An audit by the Louisiana Insurance Commissioner revealed that Dixie Lloyds had a statutory deficit of $2.4 million, and was therefore in danger of being closed. The Insurance Commission listed as one remedial measure the payment of $1.6 million of the $2.4 million deficit.

[2]This loan was charged as a misapplication by a bank officer in Count 4.

By April 1990, Delchamps's accounts were again overdrawn. Knowing that the Bank was due to be reexamined by the Federal Deposit Insurance Corporation (the "FDIC"), Restivo wanted the February loan off the books and the overdrafts paid. On April 11, Delchamps executed another promissory note in the amount of $500,000.00, which Restivo initialled.[3] Two days later on April 13, Delchamps executed another promissory note in the amount of $485,328.96, which Restivo also initialled.[4] The Bank had no knowledge of these loans.

Restivo was subsequently charged in a twelve-count indictment with: conspiracy to misapply bank funds and make false entries in bank documents, in violation of 18 U.S.C.

---

[3]This loan was charged as a misapplication of bank funds in Count 5. The use of the loan's proceeds to pay the February loan was charged as money laundering in Count 7.

[4]This loan was charged as a misapplication by a bank officer in Count 6.

§ 371 (1988) (Count 1); executing a scheme to defraud a bank, in violation of 18 U.S.C. §§ 1344, 2 (1988) (Counts 2-3);[5] willful misapplication by a bank officer, in violation of 18 U.S.C. §§ 656, 2 (1988) (Counts 4-6); money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 2 (1988) (Counts 7-9); knowingly making false entries in bank documents, in violation of 18 U.S.C. § 1005 (1988) (Count 10); and perjury before a grand jury, in violation of 18 U.S.C. § 1623(a) (1988) (Counts 11-12). Restivo was convicted on eleven of the twelve counts of the indictment.[6] He was sentenced to a

---

[5]Delchamps operated a check-kiting scheme, whereby cross deposits were made in the Bank and the Bank of Louisiana making it appear that there were substantial deposits in both banks. Restivo's knowing participation in the check-kiting scheme was charged as bank fraud in Count 3. The use of the scheme's proceeds to pay the April 13 loan was charged as money laundering in Counts 8 and 9.

[6]The jury returned a verdict of not guilty on Count 4.

prison term of 100 months, followed by three years supervised of release.

On appeal, Restivo contends that: (a) the district court denied his counsel the opportunity to effectively cross-examine Delchamps, a key government witness; (b) the district court's jury instruction regarding the money laundering counts constructively amended the indictment; and (c) the evidence was insufficient to support his convictions on Counts 3, 7, 8, and 9 of the indictment.

II

A

Restivo first contends that the district court denied his counsel the opportunity to effectively cross-examine Delchamps, by limiting cross-examination on the following subjects: (1) whether a "cap" existed on Delchamp's sentence as a result of his plea agreement; (2) whether the government had to agree that Delchamps was telling the truth before it filed a substantial assis-

tance letter on his behalf;[7] and (3) whether Delchamps pled guilty to spare his daughter and son-in-law from prosecution. "While the scope of cross-examination is within the discretion of the trial judge, this discretionary authority comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment."[8] The Confrontation Clause of the Sixth Amendment is satisfied where defense counsel has been "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the

---

[7] *See* United States Sentencing Commission, *Guidelines Manual*, § 5K1.1 (Nov. 1992).

[8] *United States v. Elliott*, 571 F.2d 880, 908 (5th Cir.) (attribution omitted), *cert. denied*, 439 U.S. 953, 99 S. Ct. 349, 58 L. Ed. 2d 344 (1978).

witness."[9] To demonstrate an abuse of discretion, Restivo must show that the limitations imposed upon his counsel's cross-examination were clearly prejudicial.[10]

Notwithstanding the district court's restrictions on cross-examination, the record demonstrates that Restivo's counsel was permitted to expose to the jury the following: that Delchamps entered into a plea agreement with the government; that Delchamps could have been charged with the more serious offense of money laundering if not for his plea agreement; and that the issuance of the § 5K1.1 letter for sentencing purposes was within the discretion of the government. Based upon these facts, the

---

[9]*Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111, 39 L. Ed. 2d 347 (1974); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S. Ct. 1431, 1436, 89 L. Ed. 2d 674 (1986) (citing *Davis*).

[10]*See Elliott*, 571 F.2d at 909 (quoting *Gordon v. United States*, 438 F.2d 858, 865 (5th Cir.), *cert. denied*, 404 U.S. 828, 92 S. Ct. 139, 30 L. Ed. 2d 56 (1971)).

jury could have inferred that Delchamps was a biased witness.[11] We therefore hold that the district court's restrictions on cross-examination neither violated the dictates of the Sixth Amendment, nor were so prejudicial as to constitute an abuse of discretion.[12]

---

[11]We further note that while instructing the jury, the district court apprised the jury that "the government called as two of its witnesses Jerry Delchamps and Lloyd Hoffman, with whom the government has entered into plea agreements providing for the dismissal of some charges and lesser sentences than they would otherwise be exposed to or for the offenses to which they pled guilty."

[12]*See United States v. Vasilios*, 598 F.2d 387, 390 (5th Cir.) (holding that defendant was not prejudiced by the restrictions placed on his counsel's cross-examination of key government witness, where "[t]he jury was sufficiently apprised of other bases on which [the defendant's] credibility was vulnerable to attack"), *cert. denied*, 444 U.S. 932, 100 S. Ct. 277, 62 L. Ed. 2d 190 (1979); *Elliott*, 571 F.2d at 909 (holding that restrictions placed upon defense counsel's cross-examination did not violate Sixth Amendment violation where "the jury was well aware of the fact that most of the government's witnesses were co-conspirators and convicted felons, testifying under grants of immunity and other agreements with the prosecution").

B

Restivo next contends that the district court's jury instruction regarding the money laundering counts of the indictment, impermissibly altered the indictment. Counts 7, 8, and 9 of the indictment charged Restivo with money laundering. One of the elements of this offense, as charged in the indictment, was that Restivo knowingly entered into financial transactions involving unlawfully-obtained proceeds with the intent to promote the specified unlawful activity of bank fraud charged in Count 2. When instructing the jury on this element, the district court failed to mention bank fraud. Instead, the court instructed the jury that the term "specified unlawful activity" includes "theft, embezzlement or misapplication by a bank officer or employee." Restivo argues that the variance between the instruction and the indictment amounted to a constructive amendment of the indictment

warranting reversal. Because Restivo did not raise this alleged error before the district court, we review the court's instruction for plain error.[13] Plain error is error so obvious and substantial that failure to notice it would affect the fairness, integrity, or public reputation of the judicial proceedings and would result in manifest injustice.[14]

The Fifth Amendment guarantees that a criminal defendant will be tried only on charges presented in a grand jury indictment. "Incident to this constitutional guarantee is the longstanding principle of our criminal justice system that the charges

---

[13]*See United States v. Mize*, 756 F.2d 353, 355 (5th Cir. 1985) (reviewing alleged error in jury instruction for plain error where no objection made at trial), *cert. denied*, 484 U.S. 943, 108 S. Ct. 328, 98 L. Ed. 2d 355 (1987); *United States v. Fitzpatrick*, 581 F.2d 1221, 1223 (5th Cir. 1978) (same).

[14]*United States v. Lopez*, 923 F.2d 47, 50 (5th Cir.), *cert. denied*, ___ U.S. ___ 111 S. Ct. 2032, 114 L. Ed. 2d 117 (1991).

contained in an indictment may not be broadened or altered through amendment, except by the grand jury itself."[15] An amendment may be explicit, implicit, or constructive.[16] In deciding whether the district court's jury instruction amounted to a constructive amendment of the indictment, we must determine whether the instruction permitted the jury to convict the defendant on a factual basis that effectively modified an essential element of the offense charged.[17] If so, then reversal is required because the defendant may have been convicted on a ground not

---

[15]*United States v. Chandler*, 858 F.2d 254, 256 (5th Cir. 1988) (citing *Stirone v. United States*, 361 U.S. 212, 215-17, 80 S. Ct. 270, 272-73, 4 L. Ed. 2d 252 (1960)).

[16]*Id.*

[17]*See United States v. Doucet*, 994 F.2d 169, 172 (5th Cir. 1993); *Mize*, 756 F.2d at 355; *United States v. Young*, 730 F.2d 221, 223 (5th Cir. 1984).

charged in the indictment.[18] If not, then the district court's "refusal to restrict the jury charge to the words of the indictment is merely another of the flaws that mar its perfection but do not prejudice the defendant."[19]

Restivo was charged with, as an essential element of the money laundering counts, conducting financial transactions with the intent to promote the specified unlawful activity of bank fraud. Although the district court instructed the jury that the term "specified unlawful activity" includes theft and embezzlement, we disagree with Restivo's assertion that the inclusion of these terms amounted to a constructive

---

[18]*Young*, 730 F.2d at 223; *see Stirone*, 361 U.S. at 213, 80 S. Ct. at 271 ("The crucial question . . . is whether [the defendant] was convicted of an offense not charged in the indictment.").

[19]*Young*, 730 F.2d at 223 (quoting *United States v. Ylda*, 643 F.2d 912, 914 (5th Cir. Unit A 1981)).

amendment of the indictment. The government did not offer and the district court did not permit in evidence, any facts to support these alternative bases of proving the "intent to promote" element of money laundering. Consequently, there is no possibility that the jury was permitted to convict Restivo -- in view of the trial evidence -- on a ground (the intent to promote theft or embezzlement) not charged in the indictment.[20]

The district court's definition of the term "specified unlawful activity" to include misapplication by a bank officer also

---

[20]*See United States v. Slovacek*, 867 F.2d 842, 847 (5th Cir.) ("If the court, through its instructions *and facts it permits in evidence*, allows proof of an essential element of a crime on an alternative basis permitted by the statute but not charged in the indictment, per se reversal is required." (emphasis added)), *cert. denied*, 490 U.S. 1094, 109 S. Ct. 2441, 104 L. Ed. 2d 997 (1989); *Ylda*, 653 F.2d at 914 (holding that the evidence raised no possibility that the defendant's conviction was based on anything other than the facts set forth in the indictment.)

did not amount to a constructive amendment of the indictment. Again, the money laundering counts of the indictment charged Restivo with conducting financial transactions with the intent to promote the bank fraud described in Count 2 of the indictment. According to Count 2, Restivo accomplished this bank fraud "by means of false and fraudulent pretenses and representations as to the bank's profitability *by continuing to fund the operations of Dixie Lloyd's and related companies*." It is undisputed that Restivo was able to fund Dixie Lloyds's operations through his misapplication of bank funds, which is detailed in Count 5 of the indictment. Because the misapplication by a bank officer was included in the indictment's description of bank fraud, there is no possibility that Restivo was convicted upon a ground (the intent to promote the misapplication by a bank officer) not

charged in the indictment.[21] The district court apparently defined the term "specified unlawful activity" to *only* include theft, embezzlement, or misapplication by a bank officer. We therefore hold that any variance between the indictment and the jury instruction did not amount to a constructive amendment of the indictment, and was at

---

[21]We further note that the government's theory at trial for proving money laundering did not diverge from the indictment -- i.e., that Restivo acted with the intent to promote bank fraud. This is evident from the government's final argument to the jury:

> Count 7 is money laundering. Money laundering. What essentially that boiled down to is basically elements. You got an illegal activity such as misapplication. You got a financial transaction; that is, the movement of money by financial means. In this case it's a credit memo. You got this two hundred thousand dollars which represents Count 7 in the indictment. This money went to pay off this illegal loan. *It promoted the overall bank fraud which the defendant is charged with.*

Record on Appeal vol. 13, at 123-24 (emphasis added).

most, harmless error. Accordingly, we find no plain error in the district court's jury instructions.

C

Lastly, Restivo contends that the evidence was insufficient to support his convictions on Counts 3, 7, 8, and 9 of the indictment. Count 3 charged Restivo with executing and attempting to execute a check-kiting scheme to defraud the Bank, in violation of 18 U.S.C. §§ 1344, 2. Counts 7, 8, and 9 of the indictment charged Restivo with money laundering, in violation of 18 U.S.C. §§ 1955(a)(1)(A)(i), 2.

When deciding the sufficiency of the evidence, we view the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, and ask whether a rational jury could have found the essential elements of the offenses beyond a

reasonable doubt.[22] The evidence need not exclude every rational hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact based upon the evidence could find guilt beyond a reasonable doubt.[23] We further accept all credibility choices which tend to support the jury's verdict.[24]

To convict Restivo of bank fraud, the government had to prove that Restivo knowingly executed a scheme to defraud with the intent to defraud the Bank.[25] A "scheme to defraud" includes any false or fraudulent

---

[22]*United States v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2952, 119 L. Ed. 2d 575 (1992).

[23]*Id.*

[24]*United States v. Anderson*, 933 F.2d 1261, 1274 (5th Cir. 1991).

[25]*See* 18 U.S.C. § 1334; *United States v. Saks*, 964 F.2d 1514, 1518 (5th Cir. 1992).

pretenses or representations intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived.[26] A defendant acts with the requisite intent to defraud if he acted knowingly and with the specific intent to deceive, ordinarily for the purposes of causing some financial loss to another or bringing about some financial gain to himself.[27]

Although Restivo concedes the existence of the check-kiting scheme, he argues that he did not know of the kite, and therefore did not possess the requisite intent to defraud. Proof of an intent to defraud "may arise by inference from all of the facts and circumstances surrounding a transaction."[28]

---

[26]*Saks*, 964 F.2d at 1518.

[27]*Id.*

[28]*United States v. Aubrey*, 878 F.2d 825, 827 (5th Cir.), *cert. denied*, 493 U.S. 922, 110 S. Ct. 289, 107 L. Ed. 2d 269 (1989).

The evidence showed that, although Restivo knew Delchamps was writing checks in excess of $50,000.00 drawn on the Bank and that Delchamps's accounts were constantly overdrawn, Restivo often authorized payment of Delchamps's non-sufficient fund checks. The record also demonstrated that Restivo, when apprised by a subordinate of a possible check-kiting scheme between the Bank and the Bank of Louisiana, directed that subordinate to continue accepting checks from Delchamps which were drawn on the Bank of Louisiana. Based on this evidence, a rational trier of fact could have found beyond a reasonable doubt that Restivo knew of the kite and intended to deceive the Bank. We therefore hold that sufficient evidence supported his conviction on Count 3.

To convict Restivo of money laundering, the government had to prove that Restivo: (1) knowing that the property involved in a financial transaction represented the pro-

ceeds of unlawful activity, (2) conducted or attempted to conduct such a financial transaction which in fact involved the proceeds of specified unlawful activity (3) with the intent to promote the carrying on of specified unlawful activity.[29] Restivo's challenge to the sufficiency of the evidence supporting his convictions on Counts 8 and 9 is derivative of his challenge to the sufficiency of the evidence supporting his conviction on Count 3. Since we reject his challenge to Count 3, we also reject his challenge to Counts 8 and 9.

As for Count 7, Restivo argues that he did not act with the intent to promote the bank fraud described in Count 2. One of the aspects of the bank fraud cited in Count 2 was a knowing scheme "to defraud [the] Bank by hiding the financial condition of Dixie

---

[29]18 U.S.C. § 1956(a)(1)(A)(i); *United States v. Alford*, 999 F.2d 818, 823 (5th Cir. 1993).

Lloyd[s] and related companies and their inability to meet their financial obligations to [the] Bank." The evidence showed that Restivo used the proceeds of the unauthorized April 11 loan[30] to repay an earlier loan. Based on this transaction, a rational trier of fact could have found beyond a reasonable doubt that Restivo intended to hide the true financial condition of Dixie Lloyds from the Bank, and thus intended to promote bank fraud. We therefore hold that sufficient evidence supported his conviction on Counts 7, 8, and 9.

III

For the foregoing reasons, we AFFIRM.

---

[30]This loan was charged as a misapplication by a bank officer in Count 5.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9585

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANDREW W. RESTIVO, II,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion, November, 22, 1993, 5 Cir., , F.3d)

(December 27, 1993)

Before POLITZ, Chief Judge, REAVLEY and E. GARZA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on re-

hearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Emilion M. Garza
United States Circuit Judge

APPENDIX C

DIRECT EXAMINATION BY THE GOVERNMENT OF JERRY DELCHAMPS AS IT PERTAINED TO HIS PLEA BARGAIN

Q. Now, Mr. Delchamps, were you indicted by a federal grand jury on November 1st, 1991?

A. Yes, I was.

Q. What were you indicted for sir?

A. One count of mail fraud and one count of bank fraud.

Q. Was the mail fraud charge in relation to the operation of Dixie Lloyds Insurance Company?

A. Yes, it was.

Q. Now you said bank fraud. Would it be more correct that you were charged with conspiracy to commit bank fraud?

A. Yes, sir.

Q. Was the charge of conspiracy to commit bank fraud in relation to the operation of Dixie Lloyds Insurance Company?

A. Yes, it was.

Q. And would it be fair to say that the count of conspiracy to commit bank fraud, that you committed certain acts in connection with the operation of Dixie Lloyds as it related to the Bank of Louisiana and Schwegmann Bank?

A. Yes, it was.

Q. Okay. Mr. Delchamps, did you conspire to commit bank fraud?

A. Yes, I did.

Q. Mr. Delchamps, in connection with your -- have you pled guilty or not guilty to those charges?

A. I pleaded guilty.

Q. Okay. You pled guilty in this Courthouse, sir?

A. Yes, sir, I did.

Q. Have you been sentenced, yet?

A. No, I haven't.

Q. What Judge is going to sentence you, sir?

A. Judge --

Q. Judge Wicker? Are you familiar with that term, that lady's name?

A. Yes, it is.

Q. Okay. When are you to be sentenced, sir?

A. September the 30th.

Q. Now in connection with your plea of guilty, did you enter into a plea agreement with the Government?

A. Yes, I did.

Q. At the time you entered into a plea agreement with the Government, were you represented by an attorney?

A. Yes, I was.

Q. What was your understanding of that agreement, sir?

A. The agreement that I signed was that the Government, not the Government, but the prosecutors of the Government would ask me to tell the truth and everything I know about this case and about the insurance and operation of Dixie Lloyds and, by doing so,

they would write a letter for me, if I tell the truth exactly what happened, to the Judge and ask for a lighter sentence.

Q. Now, Mr. Delchamps, in connection with your plea agreement with the Government, did you execute a plea agreement with my office?

A. Yes, I did.

Q. Okay. I'll show you what I've marked as Government Exhibit 7 and ask you, sir, have you seen this document before?

(Counsel shows exhibit to the witness.)

A. Yes, I have.

Q. What is that document, sir?

A. This is the plea agreement with the United States Government and myself.

Q. Did you sight that agreement?

A. Yes, I did.

MR. PERRICONE: In connection with the witness' testimony, Your Honor, the Government would move Exhibit 7, the plea agreement, into evidence.

MR. O'CONNOR: No objection.

THE COURT: All right. Let it be admitted.

BY MR. PERRICONE:

Q. Mr. Delchamps, did the Government promise you anything?

A. No, they didn't.

Q. Did I promise you anything?

A. No, you didn't.

Q. What could violate that agreement that's Exhibit 7?

A. If I would lie and wouldn't tell the truth.

Q. Okay. Do you have any other agreements with the Government at this time, sir?

A. No, sir, I don't.

APPENDIX D

CROSS-EXAMINATION OF JERRY DELCHAMPS AS IT PERTAINED TO HIS PLEA BARGAIN

BY MR. O'CONNOR:

Q. Now, you went over the indictment to which you pled guilty and you pled guilty to two counts?

A. That's right.

Q. Okay. Neither one of those counts dealth with money laundering?

A. No, sir.

Q. Was it suggested to you that you could have been charged with a money laundering count similar to the one by which Mr. Restivo is indicted?

A. I do not know what Mr. Restivo was indicted on.

Q. Were you told that you could have been indicted and that but for your plea agreement it would have happened, do you recall those discussions?

A. Yes, I could have been indicted for money laundering.

Q. So as far as your plea agreement, you got a cap on the maximum amount of sentence that you could possibly receive in any set of circumstances?

MR. PERRICONE: Your Honor, the government would object to any testimony relative to sentence. It's not proper questioning, it's not proper topic for the jury, and Mr. O'Connor knows that.

MR. O'CONNOR: Your Honor, I was simply establishing a cap, not anything that could be discretionary.

MR. PERRICONE: Your Honor, in fact --

THE COURT: There is no cap.

MR. PERRICONE: You said it for me, Your Honor.

THE COURT: The objection is sustained.

BY MR. O'CONNOR:

Q. Do you understand that an important part of the determination of your sentence

will depend on whether or not you get a 5K letter setting forth the amount of your cooperation as perceived by the United states Attorney's Office?

A. Yes, sir.

Q. Okay. And where that doesn't equate out to any numerical function of time and may in fact be disregarded by the sentencing judge, it's a very important factor to you?

A. Yes, sir.

Q. And the only way you can get that 5K letter is if Mr. Perricone and the office of the United States Attorney think you've earned it?

A. Or if I tell the truth, which I'm doing.

Q. But they have to agree that what you say is the truth in order for them to write that letter. They're not obligated to give you that letter?

MR. PERRICONE: I object. That's not part of the agreement. Exhibit 7's in

evidence. If Mr. O'Connor wants to cross-examine the witness from Exhibit 7, which is the plea agreement, we have no objection to that. I think he's misstating the agreement.

THE WITNESS: They also said it's up to the Judge to sentence me.

MR. O'CONNOR: Right. I'm going by what his understanding is and he said he knew what a 5K was and that it's important.

THE COURT: Well, he signed a plea agreement.

MR. PERRICONE: That's his understanding.

MR. O'CONNOR: Well, he might have an understanding aside from what's in the plea agreement.

THE COURT: I doubt it.

MR. O'CONNOR: Well, I'm just saying he testified about the 5K and that it was important and that's all I was trying to --

THE COURT: Is your understanding of the plea agreement what was represented by the document that you signed?

THE WITNESS: Yes, ma'am.

THE COURT: And that document is in evidence. The jury can review it.

BY MR. O'CONNOR:

Q. Now, your daughter was also an owner of the company, was she not?

A. That's right.

Q. And she's a college graduate, is she not?

A. Yes.

Q. And she worked very frequently and very often in the affairs of Dixie Lloyds?

A. Yes.

Q. And so did her husband Steve Bossier?

A. Yes.

Q. And they signed many, many, many of these checks that are in evidence?

A. I don't know if Steve signed many of them, I know Barbara did.

Q. Okay. Steve accompanied you on many of your trips to see regulators and others?

A. No.

Q. Didn't he go with you to see the Attorney General?

A. Steve and my daughter did, yes.

Q. Okay. And they made other trips on company business with you to explain the affairs of the company?

A. My daughter did, my son-in-law didn't.

Q. Didn't you credit your son-in-law with the mistake in overpaying claims that caused the cash flow problem?

A. Repeat this again now?

Q. In at least one occasion didn't you attribute the problem the company was having with the fact that you paid out too much money in claims at one time?

A. That's right.

Q. And he was in charge of making those decisions, it was his decision that caused you the big problem --

A. It was --

Q. -- you said.

A. -- his and one or two other people. It was his, my daughter's and Myrna Irman's (phonetic).

Q. And all through the check kite, they worked with the company and signed checks and answered the phone?

A. That's right.

Q. And it was not part of the deal that you described or is it in your plea agreement, but --

MR. PERRICONE: Your Honor, I'm going to object. Again, Exhibit 7 is the controlling document regarding Mr. Delchamps' agreement with the government. Mr. O'Connor knows this.

MR. O'CONNOR: No, I'm just exploring what the facts are, Your Honor, that none of these other people have been charged.

THE COURT: I don't see the relevance.

BY MR. O'CONNOR:

Q. Isn't it a fact that you paid for the Bossiers' house in Mississippi out of one of the acounts, their monthly notes?

MR. PERRICONE: Your Honor, I'm going to object to the relevance.

THE COURT: What's the relevance, Mr. O'Connor?

MR. O'CONNOR: That he, by his agreed testimony, has benefited himself and those for whom he cares to a much greater degree, not by contract, but for whatever reason have come out with a very nice total package.

MR. PERRICONE: Your Honor, may we approach the bench?

THE COURT: Yeah.

MR. PERRICONE: Mr. O'Connor's going to testify, let's put him under oath.

(Bench conference.)

THE COURT: I don't see the relevance to paying off the loan.

MR. O'CONNOR: To show that they had an interest and participated, that they did as much as anybody did. They're not charged. They're not named as targets or subjects.

THE COURT: And they're not on trial.

MR. PERRICONE: They're not on trial.

MR. O'CONNOR: And my suggestion or the inference for the jury to draw is that by his cooperation Mr. Delchamps has caused the government to choose, not by contract, but just to ignore them.

MS. HARRIS: Judge, there's a jury instruction that says that they cannot deliberate on the guilt or innocence of any other party. Secondly, they're asking him to draw an improper inference because the plea agreement is the only agreement there is and it states it on its face. So what you're trying to do is get an inference of unfairness on the government which is not a jury issue. That unfairness being that we're picking and choosing who to charge.

MR. O'CONNOR: No, the inference is that he has an incentive, that he has an interest in telling the truth as you all see it, of pleasing you with his testimony because it will benefit him and those near him. That it's a biased --

MR. PERRICONE: That's not in the agreement, Your Honor.

THE COURT: You haven't proven bias.

MR. PERRICONE: That's not in the agreement.

MR. O'CONNOR: I don't think I'd have to prove it's in the agreement in the four corners if he has benefited from it.

THE COURT: The government doesn't have to approve his testimony. It only has to be truthful.

MR. O'CONNOR: But who reports to the court whether they believe it was truthful or not? Who is Judge Wicker going to look to as to whether the testimony was truthful or not?

THE COURT: She could very likely look to the jury verdict and to me.

MR. O'CONNOR: She could but she should also look to a 5K letter.

MS. HARRIS: And very likely call up this judge.

MR. O'CONNOR: I mean all of those are possible. I was simply saying he has an interest to help some people around him.

MR. PERRICONE: It is not in the plea agreement. Show me the plea agreement where it says I will not charge his daughter or son-in-law. Show me where it says that.

MR. O'CONNOR: I'm just going beyond it saying that there were understandings or hopes. He hopes --

MR. PERRICONE: You're going beyond --

MR. O'CONNOR: -- that they'll take --

MR. PERRICONE: You're going beyond the scope of direct examination.

THE COURT: You really have.

MR. PERRICONE: I'm enjoying his testimony and that's why I have not been objecting but every twenty minutes.

THE COURT: But he did say it for the fifteenth time that it was not.

MR. PERRICONE: You want to go for sixteen?

MR. O'CONNOR: Okay. I'll get off of it.

THE COURT: Stay off this.

(End of bench conference.)

APPENDIX E

October 3, 1991

Honorable Veronica Wicker
United States District Judge
Eastern District of Louisiana
500 Camp Street
New Orleans, Louisiana 70130

Re: United States v. Jerry D. Delchamps
Criminal Docket No. 91-527 "L" (2)

Dear Judge Wicker:

In compliance with the holding of Bryan v. United States, 492 F.2d 775 (5th Cir. 1974), and with Rule 11 of the Federal Rules of Criminal Procedure, the United States of America wishes to acknowledge the following agreement between the Government and the defendant, in the above captioned proceeding. Defendant's undersigned counsel has reviewed the terms of this agreement; has explained the terms of this agreement to defendant; and has ensured that defendant fully understands the terms of this agreement. Mr. John Messina has been advised by

the defendant that the defendant fully understands the terms of this agreement.

The defendant has agreed to tender to the Court a plea of guilty to one count of conspiracy to commit bank fraud (Title 18, United States Code, Section 1344, 371) and one count of mail fraud (Title 18, United States Code, Section 1341).

The defendant understands that the maximum possible penalty for the offense of conspiracy to commit bank fraud is five years imprisonment and a $10,000 fine or both, or in the alternative to the fine stated earlier, a fine of $250,000 or the greater of twice the gross gain to the defendant or twice the gross loss to any person under Title 18, United States Code, Section 3571. It is also understood that the Court may order restitution to any victim in this case under the provisions of Title 18, United States Code, Section 3663, if the Court finds it appropriate to do so.

Further, the defendant understands that a mandatory special assessment of $50.00 shall be imposed under the provisions of Title 18, United States Code, Section 3013. Further, the defendant understands that the Court, in imposing the sentence for term of imprisonment, may include as part of the sentence, a requirement that the defendant be placed on a term of supervised release after imprisonment for a period up to three years, pursuant to Title 18, United States Code, Section 3583.

The defendant further understands that the maximum possible penalty for the offense of mail fraud is five years imprisonment and a $1,000 fine or both, or in the alternative to the fine stated earlier, a fine of $250,000 or the greater of twice the gross to the defendant or twice the gross loss to any person under Title 18, United States Code, Section 3571. It is also understood that the Court may order restitution to any

victim in this case under the provisions of Title 18, United States Code, Section 3663, if the Court finds it appropriate to do so. Further, the defendant understands that a mandatory special assessment fee of $50.00 shall be imposed under the provisions of Title 18, United States Code, Section 3013. In addition, the defendant further understands that the Court, in imposing the sentence of a term of imprisonment, may include as part of that sentence a requirement the defendant be placed on a term of supervised release after imprisonment for a period of up to three years, pursuant to Title 18, United States Code, Section 3583. Supervised release is a period of time following release from prison during which the defendant's conduct will be monitored by the Court or the Court's designee. The defendant fully understands that if the defendant violates any of the conditions of the supervised release that the Court has

imposed, the defendant's supervised release may be revoked and defendant may be ordered by the Court to serve in prison all or part of the term of the supervised release.

The defendant understands that any discussions with the defendant's attorney or anyone else regarding the sentencing guidelines are merely rough estimates and the Court is not bound by those discussions. The defendant additionally understands that the Court could impose a maximum term of imprisonment and fine allowed by law, including improvision of supervised release.

This plea agreement is predicated upon the fact that the defendant agrees to submit to interviews whenever and wherever requested by law enforcement authorities. The defendant understands that he must be completely truthful. The defendant also agrees to appear before the Grand Jury or Trial Jury and to testify truthfully. The defendant agrees that if he is not truthful, this

agreement will be null and void and the defendant may be prosecuted for perjury or making false statements. The defendant agrees neither to implicate anyone falsely nor to exculpate or protect anyone falsely. The defendant further agrees to immediately advise the Government as to any person the defendant believes to be violating the law and the defendant agrees to assist the Government with regard to the investigation and prosecution of the criminal conduct.

The Government agrees to bring to the attention of the Court any cooperation rendered by the defendant prior to sentencing. The United States may, but shall not be required to make a motion requesting the Court to depart from the sentencing guidelines in the event the defendant provides "substantial assistance". It shall be the sole discretion of the United States Attorney as to whether a motion requesting depar-

ture from the sentencing guidelines should be filed.

The Government also agrees that any statements or testimony given by the defendant pursuant to questions asked by federal agents or prosecutors as a result of this agreement will not be used against the defendant nor will anything derived from the statements or testimony be used against the defendant except for the purpose of impeachment. However, all parties understand that any statements or testimony given by the defendant shall be used as leads or for any other reasons against other persons. Further, the defendant fully understands that should he commit perjury or give false statements to federal agents, the statements and testimony can be used to prove those offenses, and he faces additional criminal charges.

The defendant agrees to disclose his ownership of all assets involved in or

obtained through violations of financial institution fraud. The defendant agrees not to contest forfeiture of assets deemed to have been involved in financial institution fraud. Assets include but are not limited to cash, negotiable instruments, securities or real property, as well as any interest in any asset or money the defendant received or could receive from defendant's illegal activities.

The defendant understands that the statements set forth above represent the defendant's entire agreement with the Government; there are not any other agreements, letters or notations that will affect this agreement.

Very truly yours,

HARRY ROSENBERG
UNITED STATES ATTORNEY

/s/
SALVADOR R. PERRICONE
Assistant United States Attorney